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October 1, 2019

The Honorable Kristi Noem
Governor of South Dakota
500 E. Capitol
Pierre, SD 57501

RE: **Investigation of Minnehaha County State's Attorney**

Dear Governor Noem,

I am in receipt of your letter dated September 18, 2019, requesting that my office investigate concerns regarding the extended absence of the Minnehaha County State's Attorney Aaron McGowan (hereafter "McGowan") commencing on or about July 13, 2019. The following is a synopsis of the events, applicable case law and statutes and the investigation that was conducted by the Attorney General's Office and the South Dakota Division of Criminal Investigation.

1. On July 13, 2019, McGowan's family sought to have an "intervention" for alcohol. McGowan chose not to participate.
2. Later that same night a 9-1-1 call was made.
3. The 9-1-1 call did not originate from the McGowan residence.
4. The 9-1-1 call originated from a concerned third party, based upon McGowan sending out a video message that was perceived to be a "suicide note video."
5. The Sioux Falls Police Department and the Mobile Crisis Team (MCT) responded to the McGowan residence.
6. McGowan was the only person at the residence.
7. McGowan did have access to firearms in the residence, but at no time in the video or during his contact and interaction with law enforcement did he handle or display any sort of weapon.
8. The police department made contact with McGowan and after some discussion were allowed into the residence.

9. McGowan spoke with law enforcement and a mental health professional who assessed he was not a risk to his own or others' safety and the scene was cleared.
10. There was not an incident of domestic abuse or violence as no one else was at the residence but McGowan.
11. Law enforcement left the residence and did not make an arrest.
12. McGowan was left alone at the residence.
13. From a review of all the evidence, the Sioux Falls Police Department acted in a professional manner within the parameters of all established policies and procedures.
14. McGowan was not given preferential treatment in this instance because of his elected position, nor was he discriminated against in any way because of his position.
15. McGowan was absent from the Minnehaha State's Attorney office from July 13, 2019, to mid-September 2019.
16. McGowan did not inform his staff of the reason for his absence until August 16, 2019.
17. Some in the Minnehaha County State's Attorney Office stated that the lack of leadership or clarity as to why McGowan was gone affected morale within the office as attorneys continued to work their cases without any clear guidance regarding the situation.
18. McGowan has claimed publicly, and during the investigation, that he was on "medical leave."
19. As an elected official, McGowan does not have "medical leave" or "vacation time" like a regularly hired employee.
20. McGowan is expected to manage and ensure that the Minnehaha County State's Attorney Office runs effectively.
21. The investigation was unable to verify where McGowan was during the time period covering his absence from the office.
22. Numerous interviews were conducted of law enforcement personnel and members of the Minnehaha County State's Attorney Office.
23. Some members of the Minnehaha County State's Attorney Office stated that McGowan checked in daily throughout his extended absence and that the office was running effectively.
24. Some members of the Minnehaha County State's Attorney Office stated that McGowan was a "a very absent boss," a "hands off boss" and a "figurehead."
25. Some members of the Minnehaha County State's Attorney Office stated that McGowan's absence was a regular occurrence and that the office ran well despite his absences.

26. Some members of the Minnehaha County State's Attorney Office stated that the office continued to function as McGowan only had four cases assigned to him at the time of his absence.
27. Some members of the Minnehaha County State's Attorney Office stated that McGowan would send messages via Snapchat throughout the day saying "bar?" indicating that they should go to the bar to drink.
28. McGowan stated that these "bar?" Snapchat messages were meant as a joke and intended to relieve stress when some days were hectic.
29. Some members of the Minnehaha County State's Attorney Office stated that McGowan would ask employee(s) to bring alcohol to his house when they were working during regular business hours and he was at home.
30. McGowan stated that he did ask employee(s) to bring him alcohol, but only on occasion and only late on a Friday afternoon heading into the weekend.
31. Some members of the Minnehaha County State's Attorney Office stated that McGowan was, at times, too inebriated to drive to work and would ask employees to bring him to work.
32. McGowan denied that he ever asked anyone to drive him to work because he was inebriated but did say that he had gotten a ride to his vehicle because of drinking on the previous evening.
33. Some members of the Minnehaha County State's Attorney Office stated that a female employee asked McGowan for the day off after a trial and he agreed, provided that she bought a bottle of alcohol and he could come to her residence and drink it.
34. The female employee was interviewed and stated that McGowan did give her the day off, she bought the bottle of alcohol, he came over for a few hours and made her feel uncomfortable at times, but then he left on a bicycle.
35. Some members of the Minnehaha County State's Attorney Office stated that McGowan was visibly intoxicated at the noon meeting of the State's Attorney's Association Conference in Deadwood, South Dakota, in May, 2019.
36. McGowan stated that he had a couple drinks at the meeting because he was nervous as he had to introduce his mentor for an award in front of the association.

In your correspondence, reference is made to the possible removal of McGowan from his office. It is important to understand the removal process and the case law regarding those provisions.

Under SDCL 3-17-12, you have the authority to remove a state's attorney if they have been charged with a crime and you are informed of the charge(s). This statute directs that you "shall" in the case of a felony and "may" in the case of a misdemeanor. My investigation has not found enough evidence of a crime to charge McGowan with either a felony or a misdemeanor.

Under SDCL 3-17-3, you have the authority to remove McGowan if he:

> willfully fails, neglect, or refuse to perform any of the duties imposed upon him by, or to enforce any of the provisions of law relating to intoxicating liquors, or who shall willfully fail, neglect or refuse to perform any duties imposed upon them by law, or who shall be guilty of intoxication or drunkenness, or who shall be guilty of the violation of any law, or who shall assist or connive in violation of any law, or who shall be grossly incompetent to perform the duties of his office.

Pursuant to SDCL 3-17-3 & SDCL 3-17-7, McGowan has the right to be notified and have a hearing before a circuit court judge in Minnehaha County. A complaint will need to be filed with the circuit court containing a "brief and concise statement of the facts constituting the cause of action" along with a summons requiring McGowan to answer within ten (10) days. A hearing is then set with "...a notice of not less than five days..." McGowan also has the right to appeal the circuit court ruling to the South Dakota Supreme Court.

To aid you in your decision-making process, I am attaching the following case law for your review to ascertain how SDCL 3-17-3 has been applied and interpreted in the past. A brief synopsis of each case holding is as follows:

> *Bon Homme County v McLouth*, 19 S.D. 555, 104 N.W. 256 (1905) dealt with a school superintendent who was not in the office for at least a month, in this case the defendant was not removed from office.
>
> *Karlen v. Janklow*, 339 N.W.2d 322 (S.D. 1983) involved a writ of prohibition preventing the Governor from removing three police officers under SDCL 3-17-3, this case was reviewed by the South Dakota Supreme Court.
>
> *Steffen v Peterson*, 2000 S.D. 39, 607 N.W.2d 262 (2000) explains that the Defendant was not removed from office as removal is a drastic remedy and that to prove malfeasance or nonfeasance the offieial's conduct must affect the performance of official duties and

must relate to something of a substantial nature directly affecting the rights and interests of the public.

As your original correspondence stated, this is a matter of public interest and a swift resolution is prudent. Please let me know if you need any additional information or clarification in this matter.

Respectfully Submitted,

Jason R. Ravnsborg
ATTORNEY GENERAL

JRR/lde

Enclosures: copies of *Bon Homme County v McLouth, Karlen v. Janklow and Steffen v Peterson*

KeyCite Red Flag - Severe Negative Treatment
Criticized by Rodee v. Seaman, S.D., February 14, 1914

19 S.D. 555
Supreme Court of South Dakota.

BON HOMME COUNTY
v.
McLOUTH.

July 6, 1905.

Synopsis
Appeal from Circuit Court, Bon Homme County.

Action by Bon Homme county against J. A. McLouth. Judgment for defendant, and plaintiff appeals. Affirmed.

West Headnotes (6)

[1] **Pleading**
⇐ Appointment, authority, and duties of officers and legal representatives

A complaint, in an action under Rev. Pol. Code, § 1806, providing that all elective county, township, and precinct officers may be charged, tried, and removed from office for habitual or willful neglect of duty, to remove the superintendent of schools from office, containing only a general allegation that defendant was guilty of willful neglect of duty, without stating the facts constituting such neglect, was insufficient.

Cases that cite this headnote

[2] **Pleading**
⇐ Objections raised at trial or after verdict or judgment

Pleading
⇐ Hearing and determination

The rule that, where a complaint is first attacked by an objection to evidence, it should be most liberally construed, can only be invoked where such an objection has been overruled, the action tried on its merits, and the imperfections of the pleading cured by proper proof.

2 Cases that cite this headnote

[3] **Education**
⇐ Grounds for removal or other adverse action

Public Employment
⇐ Attendance

Under Rev. Pol. Code, § 1806, providing that all elective county, township, and precinct officers may be charged, tried, and removed from office for habitual or willful neglect of duty, one month's absence from the state is not in itself a neglect of duty on the part of a county superintendent of schools.

Cases that cite this headnote

[4] **Education**
⇐ Grounds for removal or other adverse action

Education
⇐ Duties and liabilities in general

Public Employment
⇐ Competence or performance in general

Public Employment
⇐ Particular torts

The fact that no official duty was performed during such absence does not imply willful neglect, as there may have been no such duty to perform.

Cases that cite this headnote

[5] **Education**
⇐ Grounds for removal or other adverse action

Education
⇐ Duties and liabilities in general

Public Employment
⇐ Competence or performance in general

Public Employment
⇐ Particular torts

Nor was failure to leave some one in charge of his office during his absence, the law not providing

for the appointment of a deputy or other person to perform the duties of superintendent during his absence or inability to act.

Cases that cite this headnote

[6] **Education**

Grounds for removal or other adverse action

Public Employment

Competence or performance in general

A complaint in an action under said section to remove the superintendent from office, containing only a general allegation that defendant was guilty of willful neglect of duty, without stating the facts constituting such neglect, is insufficient.

Cases that cite this headnote

Attorneys and Law Firms

*256 G. W. Kirshmann, State's Atty., and A. G. Lehr, for appellant. Elliott & Stillwell, for respondent.

Opinion

HANEY, J.

This action was instituted to remove the defendant from the office of superintendent of schools. At the trial the defendant objected to the introduction of any evidence on the grounds (1) that it appeared upon the face of the complaint that the court was without jurisdiction; and (2) that the complaint did not state facts sufficient to constitute a cause of action. The objection was sustained, and, plaintiff having elected to stand on its complaint, a verdict was directed in favor of the defendant, and judgment entered thereon, from which this appeal was taken.

Omitting title, prayer, and verification, the complaint is as follows: "The plaintiff above named, by its board of county commissioners, complains of the defendant and alleges: (1) That it is a duly and legally organized county within the state of South Dakota, and has been such organized county for more than ten years last past, and, as such organized county in this state, is authorized to elect county officers, and to institute actions for their removal for cause, to sue and be sued. (2) That said defendant was in the fall of 1900 duly elected to the office of superintendent of schools of plaintiff county for the term of two years, commencing in January, 1901, and ending in January, 1903; that in January, 1901, he duly qualified and entered upon the duties of said office, and has ever since held and is still holding said office. (3) That on or about the 9th day of September, 1902, the said defendant closed up his said office, and willfully left the state of South Dakota and plaintiff county, without leaving any one in charge of his said office, to attend to or look after his official duties, and that from said date, for more than one month following, he has utterly and completely willfully neglected and failed to attend to or perform any of the duties pertaining to said office; that this is the time of the year when the school year commences, and when the superintendent's presence is absolutely essential and necessary, as the teachers and school officers constantly have to apply to the superintendent of schools for information and instructions, in order to get the schools properly started; that the said defendant's absence and willful neglect of his official duties has caused great injury and detriment to the public schools of plaintiff county."

It is evident that the only cause of removal intended to be alleged is "willful neglect of duty." Rev. Pol. Code, § 1806. The charge is a serious one. Removal from an elective, constitutional office involves substantial consequences. The accusation in such a case should be sufficiently definite and certain to enable the accused properly to prepare his defense. As we view the complaint, the only facts alleged are (1) that the plaintiff was an organized county; (2) that defendant was the elected and qualified superintendent of schools; and (3) that he was voluntarily absent from the state for one month, during which time he performed no official duties, and no one was left in charge of his office. As the law did not provide for the appointment of a deputy or other person to perform the duties of superintendent *257 during his absence or inability to act, defendant neglected no duty in failing to leave some one in charge of his office. One month's absence from the state was not in itself a neglect of duty. The fact that no official duty was performed during that period does not imply willful neglect, because there may have been no official duty to perform. It does not appear on the face of the complaint that any official act was required to be done during defendant's absence. It is not alleged that any teacher applied for information which was not obtained, or that any person was prevented from transacting business with the superintendent's office. Purged of immaterial averments and legal conclusions, the complaint contains nothing more than a general allegation that the defendant was guilty of willful neglect of duty, which is

clearly insufficient. Plaintiff's contention that the complaint should be most liberally construed, because it was first attacked by an objection to the introduction of any evidence, is not tenable. That rule can only be invoked where such an objection has been overruled, the action tried upon its merits, and the imperfections of the pleading cured by proper proof.

For the reasons heretofore stated, without considering other alleged defects in the complaint, or what, if any, effect should be given the sections of the statute (Rev. Pol. Code, §§ 1806, 1807) under which it was intended to be drawn, we think the learned circuit court did not err in sustaining defendant's objection, and that its judgment should be affirmed.

All Citations

19 S.D. 555, 104 N.W. 256

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339 N.W.2d 322
Supreme Court of South Dakota.

Kent KARLEN, Richard J. Ackerson, and Thomas Schmitt, Appellees,
v.
William J. JANKLOW, Governor, State of South Dakota, Appellant.

No. 14034.
|
Considered on Briefs Sept. 12, 1983.
|
Decided Oct. 26, 1983.

Synopsis
Governor sought to remove certain police officers who had been appointed pursuant to local civil service ordinance. The Circuit Court, Sixth Judicial Circuit, Hughes County, Robert A. Miller, J., issued writ prohibiting Governor from conducting hearing concerning officers' removal, and Governor appealed. The Supreme Court, Fosheim, C.J., held that in light of statute providing that policemen appointed under civil service ordinances could be removed only pursuant to provisions of ordinance, Governor's authority to remove law enforcement officials was properly construed as limited to officers not appointed under civil service ordinances.

Affirmed.

Procedural Posture(s): On Appeal.

West Headnotes (3)

[1] **Statutes**
⇐ Construing together; harmony
Statutes
⇐ Conflict
Where conflicting statutes appear, it is responsibility of court to give reasonable construction to both, and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable; repeal by implication will be indulged only where there is manifest and total repugnancy, and if, by any reasonable construction, both acts can be reconciled, they should be.

11 Cases that cite this headnote

[2] **Municipal Corporations**
⇐ Authority to remove, take evidence, or conduct hearing
Public Employment
⇐ Authority to impose adverse action; manner and mode of imposition
In light of statute providing that policemen appointed under civil service ordinances could be removed only pursuant to provisions of ordinance, Governor's authority to remove law enforcement officials was properly construed as limited to officers not appointed under civil service ordinances. SDCL 3–17–3, 9–14–15.

Cases that cite this headnote

[3] **Statutes**
⇐ Construction of Amendatory and Amended Statutes
Although there are no principles of construction which prevent using subsequent enactments or amendments as aid in arriving at direct meaning of statute, legislative adoption of subsequent amendment is not binding on court interpreting statute.

3 Cases that cite this headnote

Attorneys and Law Firms

*322 Thomas P. Tonner, Aberdeen, for appellee, Kent Karlen.

Daniel R. Moen, Aberdeen, for appellee, Richard J. Ackerson.

William D. Gerdes, Aberdeen, for appellee, Thomas Schmitt.

Jon R. Erickson, Asst. Atty. Gen., Pierre, for appellant; Mark V. Meierhenry, Atty. Gen., Pierre, on the brief.

Opinion

FOSHEIM, Chief Justice.

This appeal is from a writ prohibiting the Governor from conducting a hearing pursuant to SDCL 3–17–3 concerning the removal of appellee police officers Kent Karlen, Richard J. Ackerson, and Thomas Schmitt from the Aberdeen, South Dakota Police Department. * We affirm.

Appellees are police officers of the City of Aberdeen and are governed by the Aberdeen Civil Service Ordinance. Revised Ordinances of Aberdeen No. 1567, §§ 21–43 through 21–85. SDCL 9–14–15 provides that policemen appointed under a civil service ordinance may be removed only pursuant to the provisions of that ordinance.

The Governor, however, maintains that he also has power of removal pursuant to the authority granted in SDCL 3–17–3:

> The Governor shall have power, after notice and hearing, to remove from office any state's attorney, sheriff, or police officer, or any deputy or assistant state's attorney, or deputy sheriff who shall willfully fail, neglect, or refuse to perform any of the duties imposed upon him by, or to enforce any of the provisions of law *323 relating to intoxicating liquors, or who shall willfully fail, neglect, or refuse to perform any duties imposed upon them by law, or who shall be guilty of intoxication or drunkenness, or who shall be guilty of the violation of any law, or who shall assist or connive in the violation of any law, or who shall be grossly incompetent to perform the duties of his office.

[1] There is obviously a conflict between the two statutes. Both are clear and unambiguous. SDCL 3–17–3 was enacted in its present form in 1923. SDCL 9–14–15 became law in 1939. Where conflicting statutes appear, it is the responsibility of the court to give a reasonable construction to both, and to give effect, if possible, to all provisions under consideration, construing them together to make them harmonious and workable. *Welcome Wagon Intern. v. S.D. Dept. of Revenue*, 318 N.W.2d 5 (S.D.1982); *State v. Hoxeng*, 315 N.W.2d 308 (S.D.1982); *Matter of Sales Tax Refund Applications*, 298 N.W.2d 799 (S.D.1980). Repeal by implication will be indulged only where there is a manifest and total repugnancy. *Id.; Department of Public Safety v. Cronin*, 250 N.W.2d 690 (S.D.1977); *Northwestern Public Serv. v. City of Aberdeen*, 90 S.D. 627, 244 N.W.2d 544 (1976). If, by any reasonable construction, both acts can be reconciled, they should be. *Matter of Sales Tax Refund Applications, supra; State v. Myott*, 246 N.W.2d 786 (S.D.1976).

[2] The circuit court avoided a repeal by implication by giving effect to both SDCL 3–17–3 and SDCL 9–14–15, whereby the Governor's authority to remove law enforcement officials was construed as limited to officers not appointed under civil service ordinances. We approve this construction. It reconciles the two statutes, gives the fullest possible effect to each, and allows civil service employees the protection of the system while still providing a civil service procedure through which officers appointed under a civil service ordinance can be terminated when good cause exists.

[3] After the instant dispute arose, the 1983 legislature amended SDCL 9–14–15 by including the following language: "Nothing in this section restricts the Governor's authority, pursuant to § 3–17–3, to remove local law enforcement officers, including those appointed under any civil service ordinance." Although there are no principles of construction which prevent using subsequent enactments or amendments as an aid in arrising at the direct meaning of a statute, the legislative adoption of a subsequent amendment is not binding on the court. It is not a controlling retroactive interpretation. *Hot Springs, Etc. v. Fall River Landowners*, 262 N.W.2d 33 (S.D.1978).

Accordingly, the circuit court's disposition of this matter is affirmed.

All the Justices concur.

All Citations

339 N.W.2d 322

Footnotes

* An account of the factual background is available in the companion case, *Matter of Ackerson*, 335 N.W.2d 342 (S.D.1983).

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607 N.W.2d 262
Supreme Court of South Dakota.

STATE of South Dakota, ex rel. Sandy STEFFEN, Plaintiff and Appellant,
v.
Jerry PETERSON, the Gregory County Register of Deeds, Defendant and Appellee.

No. 21025.
|
Argued Jan. 11, 2000.
|
Decided March 15, 2000.

Synopsis

County commenced proceeding to remove register of deeds on ground of malfeasance or nonfeasance in the collection, remittance, and accounting of fees. The Circuit Court, Sixth Judicial Circuit, Gregory County, Max A. Gors, J., held that register of deeds' conduct did not warrant removal from office and awarded register of deeds $25,677.12 in expenses incurred in his defense. County appealed and, by notice of review, register of deeds appealed denial of additional fees and costs. The Supreme Court, Miller, C.J., held that: (1) register of deeds' conduct did not warrant removal from office; (2) trial judge's comment that his decision would be short-lived due to upcoming election was not reviewable; (3) awarding register of deeds his total disbursements, rather than equally apportioning expenses, was an abuse of discretion; and (4) register of deeds was not entitled to award of attorney fees incurred in pursuing an award of attorney fees.

Affirmed in part and reversed in part.

Konenkamp, J., concurred in part and concurred in result in part and filed a statement.

Sabers, J., concurred in part and concurred in result in part and filed a statement, in which Konenkamp, J., joined.

West Headnotes (20)

[1] **Public Employment**
⇐ Competence or performance in general
Registers of Deeds
⇐ Appointment, election, qualification, and tenure

County register of deeds' conduct in collection, remittance, and accounting of fees did not warrant removal from office; although register of deed admittedly failed to comply with the strict letter of the law, be did not do so with a corrupt or evil design or purpose, his practice of charging fees, rather than collecting them in advance, was consistent with practices of other register of deeds' office in the State, and its resulting "pyramiding" effect caused shortage of funds, which in turn resulted in late remittance of fees, and improper handling of funds paid by credit reporting agency was a mistake that continued until practice was discovered. SDCL 3–17–6.

Cases that cite this headnote

[2] **Counties**
⇐ Removal or other adverse action
Public Employment
⇐ Removal, separation, termination, and discharge in general

Standard of review in a proceeding for the removal of a county official is under an abuse of discretion standard.

Cases that cite this headnote

[3] **Courts**
⇐ Abuse of discretion in general

"Abuse of discretion" is discretion not justified by, and clearly against, reason and evidence; the test is whether a judicial mind, in view of the law and circumstances, could reasonably have reached the same conclusion.

Cases that cite this headnote

[4] **Public Employment**
⇐ Nature, form, and right of action

Removal of public officers from office is a drastic remedy, and statutory provisions prescribing the grounds for removal are strictly construed. SDCL 3–17–6.

Cases that cite this headnote

[5] **Public Employment**
⇦ Nature, form, and right of action

Remedy provided by removal statutes is heroic in nature and relatively drastic where the usual method of removing public officeholders is by resort to the ballot. SDCL 3–17–6.

Cases that cite this headnote

[6] **Public Employment**
⇦ Removal, separation, termination, and discharge in general

Evidence required to warrant removal of a public official must be clear, satisfactory, and convincing. SDCL 3–17–6.

Cases that cite this headnote

[7] **Public Employment**
⇦ Conduct or Misconduct in General

To constitute malfeasance or nonfeasance, as would warrant removal of public official, the official's conduct must affect the performance of official duties and must relate to something of a substantial nature directly affecting the rights and interests of the public. SDCL 3–17–6.

Cases that cite this headnote

[8] **Public Employment**
⇦ Conduct or Misconduct in General

"Malfeasance," for purposes of statute establishing grounds for removal of public officers, is not susceptible of an exact definition but it has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by a public officer in his official capacity that is wholly illegal and wrongful. SDCL 3–17–6.

Cases that cite this headnote

[9] **Public Employment**
⇦ Conduct or Misconduct in General

"Nonfeasance," for purposes of statute establishing grounds for removal of public officers, is the neglect or refusal, without sufficient excuse, to do that which is the officer's legal duty to do. SDCL 3–17–6.

Cases that cite this headnote

[10] **Appeal and Error**
⇦ Opinion of lower court

Acknowledgement by trial judge that his decision not to remove county register of deeds from office would be short-lived, since there was an upcoming election and the voters could unseat register of deeds if they saw fit, was not incorporated into the findings of fact and conclusions of law and, therefore, was superfluous and not reviewable.

Cases that cite this headnote

[11] **Courts**
⇦ Dicta

Any expression of opinion or views by the trial judge extraneous to his decision in the manner and form contemplated by law is of no binding force or effect as a matter of law either upon the trial judge himself or any one else.

Cases that cite this headnote

[12] **Appeal and Error**
⇦ Opinion of lower court

While expressions of opinion or views by the trial judge extraneous to his decision are helpful and indeed almost necessary in advising counsel as to the views of the court and for the information of counsel in drafting findings and conclusions for presentation to the court, such expression of opinion constitutes no proper part of the record on appeal, whether announced in the form of an oral statement in open court transcribed by the reporter or in the form of a memorandum or letter addressed to counsel.

Cases that cite this headnote

[13] **Appeal and Error**

Opinion of lower court

Supreme Court ignores a trial court's oral pronouncements and limit its review to the written findings and conclusions.

1 Cases that cite this headnote

[14] **Public Employment**

Items, amount, and reasonableness in general

Awarding county register of deeds his total disbursements of $25,677.12, in removal action, rather than equally apportioning his expenses, was an abuse of trial court's discretion; although register of deeds was able to retain his position, he was not completely exonerated of all wrongdoing and, through the removal proceeding, county was successful in bringing about restitution and a change in his behavior. SDCL 3–17–10.

Cases that cite this headnote

[15] **Costs**

Evidence as to items

Party filing a motion for an award of attorney fees bears the burden of proving by a preponderance of evidence its entitlement to such an award.

1 Cases that cite this headnote

[16] **Costs**

American rule; necessity of contractual or statutory authorization or grounds in equity

Attorney fees are not recoverable by either party unless such action is specifically authorized by statute.

Cases that cite this headnote

[17] **States**

Disbursements in general

Where an expenditure of public funds is involved, a statute authorizing such expenditure will be strictly construed.

Cases that cite this headnote

[18] **Public Employment**

Attorney Fees

Statute governing attorney fee awards in proceedings to remove public officials is intended to reimburse public officials who are innocent of wrongdoing in office. SDCL 3–17–10.

Cases that cite this headnote

[19] **Public Employment**

Attorney Fees

"Favorable," in statute allowing award of attorney fee to a public official if the final determination in a removal proceeding is favorable to the accused official, must be strictly construed to mean exculpation and not some lesser degree of success. SDCL 3–17–10.

Cases that cite this headnote

[20] **Public Employment**

Prevailing party

County register of deeds was not entitled to award of attorney fees incurred in pursuing an award of attorney fees in removal proceeding; register of deeds was not completely vindicated as a result of the removal proceeding, and statute governing attorney fee awards in proceedings to remove public officials did not specifically provide for the payment of fees-for-fees. SDCL 3–17–10.

Cases that cite this headnote

Attorneys and Law Firms

*264 Sandy J. Steffen, Gregory County State's Attorney, Burke, South Dakota, Attorney for plaintiff and appellant.

Richard L. Travis and David A. Pfeifle of May, Johnson, Doyle and Becker, P.C., Sioux Falls, South Dakota, Attorneys for defendant and appellee.

[¶ 7.] On September 23, 1997, Peterson told the Board he was not going to resign. A removal proceeding ensued. Throughout the proceedings, Peterson admitted that he had been late in remitting fees to the treasurer and that he had improperly handled the CBC funds. However, he adamantly denied stealing any money from his office. Peterson attributed the perpetually late remittances to an admitted shortage in the register of deeds' checking account, which was in turn caused by the accounts receivable, uncollectable accounts, supplies purchased, check charges and "things like that." While Peterson conceded that, pursuant to statute, his office was to collect fees in advance and not allow people to charge, the Minnehaha County Register of Deeds testified on his behalf that such was the common practice. It was also common practice to remit fees from the current month to pay for fees which have been charged for the prior month and which have not yet been paid, a process called "lapping." Peterson's expert witness, a CPA, testified that over a period of time, uncollectable and late accounts receivable could create a "pyramid" effect and cause a shortage in cash flow. Finally, Peterson admitted that his handling of the CBC funds was a "mistake," but that he had always deposited the payments into the register of deeds' checking account and never used any of it for personal gain.

[¶ 8.] In addition to the other allegations, County also asserted at trial that Peterson was improperly conducting political activities while on duty, as evidenced by the fact that he asked two of his deputies to work on political flyers while on county time.

[¶ 9.] At the conclusion of its three-day bench trial, the court ruled that the CBC payments received were not "fees" as defined by statute, that Peterson did not intend to evade the fifteen-day requirement for remitting funds to the treasurer, and that Peterson had not committed malfeasance, nonfeasance, theft or any other crimes in office so as to warrant removal. In a later hearing, the trial court also awarded Peterson $25,677.12 in expenses incurred in his defense.

[¶ 10.] On appeal, County raises two issues:

1. Whether the trial court abused its discretion in failing to remove Peterson for malfeasance or nonfeasance pursuant to SDCL 3–17–6?

2. Did the trial court err in finding that the decision was "favorable" to Peterson, *267 and abuse its discretion in awarding him total disbursements?

[¶ 11.] By notice of review, Peterson raises the following issue:

3. Whether the trial court erred in denying additional disbursements for attorney fees and expenses?

DISCUSSION

[¶ 12.] **1. The trial court did not abuse its discretion in failing to remove Peterson from office.**

[1] [2] [3] [¶ 13.] As to removal proceedings under SDCL 3–17–6, this Court has stated:

> It [has been asserted] that, under our statute, if any misconduct, malfeasance, or nonfeasance on the part of the officer charged is found as a fact, then the court where the proceeding is pending has no option whatsoever but is absolutely compellable as a matter of law to enter judgment of immediate ouster from office. With this contention we are unable to agree. The proceeding is at least quasi judicial in nature, and we are convinced that the trial court has some discretion in the matter, and that it is for the trial judge to determine in the first instance, doubtless subject to review in each particular case whether, under all the circumstances, the given misconduct, malfeasance, or nonfeasance found, if any is found, is sufficient to justify or require removal from office.

State ex rel. Hooper v. Tarr, 62 S.D. 305, 309, 252 N.W. 854, 856 (S.D.1934). Thus, the standard of review is under an abuse of discretion standard. " 'Abuse of discretion' is discretion not justified by, and clearly against, reason and evidence." *Nelson v. Nelson Cattle Co.,* 513 N.W.2d 900, 906 (S.D.1994) (citing *Dacy v. Gors,* 471 N.W.2d 576, 580 (S.D.1991)). "The test is whether a judicial mind, in view of the law and circumstances, could reasonably have reached the [same] conclusion." *Id.*

[¶ 14.] The trial court found that although Peterson's failure to timely remit the fees "certainly is wrong," it concluded that his misconduct did not rise to the level sufficient to warrant removal. However, the court did order Peterson to remit $1,060, (the amount of the unreported and unremitted CBC fees), and $198.60, (the shortfall between fees reported and fees remitted), to the treasurer. These amounts were in addition to the $1,500 of personal funds Peterson had previously deposited into the register of deeds' checking account.

[¶ 15.] In this appeal, County argues that in light of all this evidence, the trial judge abused his discretion in not removing Peterson for malfeasance or nonfeasance. It further argues that the trial court improperly delegated the decision of whether to oust Peterson to the voters in an upcoming primary election in which Peterson was seeking re-election to his position. We disagree.

[¶ 16.] SDCL 3–17–6 provides a mechanism for removing an elected official prior to the end of his or her term: "Any officer of any local unit of government may be charged, tried, and removed from office for misconduct, malfeasance, nonfeasance, crimes in office, drunkenness, gross incompetency, corruption, theft, oppression, or gross partiality."

[¶ 17.] County asserts that Peterson committed malfeasance and/or nonfeasance because he failed to collect fees in advance pursuant to SDCL 7–9–1,[5] and because he ***268** failed to report and remit fees pursuant to SDCL 7–9–17.[6] According to County, such failure constitutes an unlawful act, theft, under SDCL 7–9–18.[7]

[¶ 18.] In *Tarr,* this Court had the only other occasion to consider the removal provision of SDCL 3–17–6. However, the merits of the case were not reached because the appeal was dismissed on other grounds.[8] *Tarr,* 62 S.D. at 310, 252 N.W. at 857. Thus, we must look elsewhere for guidance.

[4] [5] [6] [¶ 19.] "Removal of public officers from office is a drastic remedy, ... and statutory provisions prescribing the grounds for removal are strictly construed." *Kemp v. Boyd,* 166 W.Va. 471, 275 S.E.2d 297, 301 (W.Va.1981). *See also,* 4 Eugene McQuillin, Municipal Corporations, § 12.229 (3rdEd 1992) ("Strict construction of laws authorizing removal is the rule."). The remedy provided by removal statutes is heroic in nature and relatively drastic where the usual method of removing officeholders is by resort to the ballot. *State v. Bartz,* 224 N.W.2d 632, 638 (Iowa 1974) (citation omitted). Evidence in a removal action must be "clear, satisfactory and convincing." *Id. See also, Kemp,* 275 S.E.2d at 301 (To warrant removal of an official, clear and convincing evidence is necessary.).

[7] [8] [9] [¶ 20.] "To constitute malfeasance or nonfeasance, conduct must 'affect the performance of official duties and must relate to something of a substantial nature directly affecting the rights and interests of the public.' " *Claude v. Collins,* 518 N.W.2d 836, 842 (Minn.1994) (quoting *Jacobsen* ***269** *v. Nagel,* 255 Minn. 300, 96 N.W.2d 569, 573 (Minn.1959) (citation omitted)). Malfeasance is "not susceptible of an exact definition but it 'has reference to evil conduct or an illegal deed, the doing of that which one ought not to do, the performance of an act by an officer in his official capacity that is wholly illegal and wrongful.' " *Id.*[9] Nonfeasance is the " 'neglect or refusal, without sufficient excuse, to do that which is the officer's legal duty to do.' " *Id.*[10]

[¶ 21.] A recurring factor in removal cases is the intent of the actor. In *Bartz,* county supervisors were removed because they accepted gifts from contractors with whom they dealt in their official capacities, maintained "slush" funds from sales of county equipment to purchase tools and miscellaneous supplies for the county shops, and submitted exorbitant unsubstantiated mileage reimbursement requests. *Bartz,* 224 N.W.2d at 634–37. In *Claude,* stating that ignorance or inexperience is not a sufficient excuse, the Minnesota Supreme Court removed three city council officers from office for intentionally violating the requirements of an open meeting law on at least three separate occasions. *Claude,* 518 N.W.2d at 843. In contrast, in *Kemp,* a county commissioner was not removed from office,

even though he left a county commission meeting for six hours to coach a basketball game and had erroneously received mileage reimbursement from the county. *Kemp,* 275 S.E.2d at 302–07. Instead of removal from office, the commissioner was directed to repay the sums which he obtained under his erroneous interpretation of the law, and was admonished to place his duties as a public official above his coaching obligations. *Id.* A survey of these cases reveals that where the official's intent was to evade or otherwise circumscribe the law, malfeasance or nonfeasance was found. In contrast, where there was no such intent, no malfeasance or nonfeasance existed. In *State v. Manning,* 220 Iowa 525, 259 N.W. 213, 215–16 (1935), the Iowa Supreme Court stated:

> [A]cts, whether of omission or commission, in order to constitute grounds for removal must have been done knowingly, willfully and with an evil or corrupt motive and purpose ... The primary purpose of the law ... is to protect the public interest.... While we cannot place our stamp of approval upon the manner and method pursued by these defendants in the management of the affairs of the municipality, and are in no way excusing acts and conduct which amount to actual violation of statutory laws, yet we can discern no purpose, on the part of said officials in what they did, to harm, or which was inimical to the interests of such city. No corrupt or evil design or purpose is manifest from the evidence[.]

Similarly, SDCL 7–9–18, *supra,* requires an intent to evade the provisions of SDCL 7–9–17 in order to constitute theft.

[¶ 22.] Upon reviewing the record in the instant case, we cannot hold that the trial court abused its discretion in failing to remove Peterson from office. While Peterson admittedly failed to comply with the strict letter of the law, he did not do so with a corrupt or evil design or purpose. Although he charged fees rather than collecting them in advance, his was not the only register of deeds' office in the state to do so. It was this practice of charging, and its resulting "pyramiding" effect, that caused the shortage of funds for Peterson. The shortage of funds in turn resulted in the late remittance of fees. Peterson also testified that his handling of the CBC funds was a "mistake," and that he simply *270 began handling the payments improperly and continued to do so until the practice was discovered in 1997. Perhaps part of Peterson's confusion about how to handle the CBC payments stems from the fact that, as the trial court found, the payments do not fit into any of the categories of "fees" described at SDCL 7–9–15. [11] In addition, the $198.60 that Peterson reported but did not remit is small in comparison to the total amount of fees handled during that fourteen-year period, $216,308.60.

[¶ 23.] As stated by the Iowa Supreme Court in *State ex rel. Crowder v. Smith,* 232 Iowa 254, 4 N.W.2d 267, 270 (1942): "[The defendant] may have made some mistakes, or, at times, in the opinions of others, may have exercised poor judgment; but any officer may make mistakes and still be absolutely honest. An officer may even be incompetent and still be honest and the soul of integrity." It further concluded, "There is no man in official position so letter perfect in the law that he does not at some point by act or omission or misconstruction of the law, though with perfect integrity of motive, fall short of the strict statutory measure of his official duty." *Id.* 4 N.W.2d at 271.

[10] [¶ 24.] Additionally, we find the trial court did not abdicate its authority to remove an elected official. SDCL 3–17–7 provides in pertinent part that "it shall be the duty of judge of the circuit court to ... hold a special term thereof, at which term the issues in such proceeding shall be heard and determined by the court." County argues that the court "[threw] the removal decision over to the voters of Gregory County" when it made the following remark (after stating that there was an adequate explanation for the late remittal of fees and that such explanation was sufficient to justify Peterson's non-removal) in its bench ruling:

> And I say that mindful of the fact that this is an election year and that there will be an election on June 2nd and that the people of Gregory County can decide whether or not Mr. Peterson's practice warrants his removal. And if he survives the primary they can decide again in the fall. And if he doesn't then the people will have

> spoken. And I believe it's for them to do that on that issue.

[¶ 25.] Peterson argues that such comment was only acknowledgement by the court that its decision would be short-lived since there was an upcoming election and *271 the voters could unseat Peterson if they saw fit. We agree.

[11] [12] [13] [¶ 26.] Our treatment of extraneous material not incorporated into the trial court's findings of fact and conclusions of law is well settled:

> "Any expression of opinion or views by the trial judge extraneous to his decision in the manner and form contemplated by law is of no binding force or effect as a matter of law either upon the trial judge himself or any one else. *Cf. Agard v. Menagh,* 60 S.D. 262, 244 N.W. 379; *Klundt v. Hemenway,* 60 S.D. 248, 244 N.W. 377. Such expressions by the trial judge are, of course helpful and indeed almost necessary in advising counsel as to the views of the court and for the information of counsel in drafting findings and conclusions for presentation to the court. But such expression of opinion constitutes no proper part of the record on appeal, whether announced in the form of an oral statement in open court transcribed by the reporter or in the form of a memorandum or letter addressed to counsel. [cites omitted]."

Mellema v. Mellema, 407 N.W.2d 827, 829 (S.D.1987) (quoting *Western Bldg. Co. v. J.C. Penney Co.,* 60 S.D. 630, 636–637, 245 N.W. 909, 911–912 (1932)). "Thus, we ignore the trial court's oral pronouncements and limit our review to the written findings and conclusions." *Id.* (citing *Jones v. Jones,* 334 N.W.2d 492 (S.D.1983); *Hitzel v. Clark,* 334 N.W.2d 37 (S.D.1983)).

[¶ 27.] The comments made by the judge in his bench ruling were not incorporated into the findings of fact and conclusions of law, therefore they are superfluous and not reviewable.

[¶ 28.] 2. The trial court abused its discretion in awarding Peterson total disbursements, because the decision was not entirely "favorable" to him.

[14] [¶ 29.] The trial court awarded attorney fees and disbursements in the amount of $25,677.12 to Peterson. The issue is whether the outcome was "favorable" to Peterson, thereby entitling him to disbursements. County argues the decision was not favorable, because Peterson likely would not have been able to retain his position had he not repaid over $2,700 from his personal funds. Peterson asserts, however, the outcome was favorable because he was able to retain his position.

[15] [16] [17] [¶ 30.] "A party filing a motion for an award of attorney's fees bears the burden of proving by a preponderance of evidence its entitlement to such an award." *Hartman v. Wood,* 436 N.W.2d 854, 857 (S.D.1989) (citing *Bd. of County Comm'rs of County of Jefferson v. Auslaender,* 745 P.2d 999, 1001 (Colo.1987)). Attorney fees are not recoverable by either party unless such action is specifically authorized by statute. *Michlitsch,* 1999 SD 69, ¶ 17, 594 N.W.2d at 734; *Hartman,* 436 N.W.2d at 857. Further, where an expenditure of public funds is involved, a statute authorizing such expenditure will be strictly construed. *Appeal of Presentation Sisters, Inc.,* 471 N.W.2d 169, 174 (S.D.1991); *Sioux Valley Hosp. Ass'n v. Davison County,* 298 N.W.2d 85 (S.D.1980) (statute authorizing payment of medical expenses for indigent person strictly construed). *See also CADO Business Systems of Ohio, Inc. v. Bd. of Educ. of Cleveland City School Dist.,* 8 Ohio App.3d 385, 457 N.E.2d 939, 944 (1983) (payment to equipment vendor denied where directives of statute authorizing expenditure were not strictly followed); *Tracy v. Fresno County,* 125 Cal.App.2d 52, 270 P.2d 57, 63 (1954) (payment of attorney fees to sheriff in defense of criminal prosecution denied because reimbursement statute only covered normal incidents of public office, not criminal actions); and *In re Naylor,* 284 N.Y. 188, 30 N.E.2d 468, 469 (1940) (payment to third medical examiner denied, where statute only authorized payment to two such examiners).

*272 [¶ 31.] Specific statutory authorization for an award of attorney fees can be found at SDCL 3–17–10, which provides:

> If the final determination of such proceeding he favorable to such accused officer, he shall be allowed the reasonahle and necessary expenses he has incurred in his defense, including a reasonahle attorney fee, to be fixed by the court or judge. Such expenses shall be paid by the county, if he he a county officer; by the township, if he be a township officer; and hy the municipality if he he an officer of such municipality.

[¶ 32.] Other courts deciding whether an outcome was "favorahle" or "successful," or whether a party "prevailed" so as be to entitled to an award of attorney fees, have reached various conclusions. In *Maglio v. City of New York,* 15 A.D.2d 197, 223 N.Y.S.2d 60 (N.Y.App.Div.1961), *aff'd,* 12 N.Y.2d 939, 238 N.Y.S.2d 515, 188 N.E.2d 789 (1963), a New York appellate court held that where a magistrate judge was not removed from office, but was instead only judicially censured, the magistrate could not be deemed a "successful party," so as to he reimhursed for attorney's fees. In denying the magistrate's claim, the court stated:

> The fact that [the magistrate] was spared the extreme penalty of removal does not detract from the gravity and effect of the finding by this court that he was guilty of conduct inconsistent with the fair administration of justice. Only by means of a play on words can it he said that [the magistrate] was successful.

Maglio, 223 N.Y.S.2d at 63.

[¶ 33.] The dissenting opinion in *Maglio,* however, emphasized that the removal of the magistrate was the "aim and purpose of the proceeding," and that the "aim and purpose failed." *Id.* at 64. "[The magistrate], therefore, was a 'successful party' in a proceeding 'to remove him from office.' ... Since the proceeding here failed of its single intended purpose, to wit: [the magistrate's] removal, the conclusion unavoidably follows that he is the 'successful party' and is entitled to recover his expenses...." *Id.*

[¶ 34.] In *Heath v. County of Aiken,* 302 S.C. 178, 394 S.E.2d 709 (S.C.1990), the South Carolina Supreme Court upheld the award of attorney fees to a sheriff who had hrought a partially successful declaratory judgment action against the county. In this regard the court stated:

> Contrary to appellants' assertion, a party need not be successful as to all issues in order to be found to be a prevailing party. A prevailing party has been defined as:
>
> > [t]he one who successfully prosecutes the action or successfully defends against it, prevailing on the main issue, even though not to the extent of the original contention [and] is the one in whose favor the decision or verdict is rendered and judgment entered.

Heath, 394 S.E.2d at 711 (quoting *Buza v. Columbia Lumber Co.,* 395 P.2d 511, 514 (Alaska 1964)).

[¶ 35.] Reimbursement of attorney fees by a state official wbo successfully defended himself against a removal proceeding was also upheld by the Supreme Court of New Hampshire. *King v. Thomson,* 119 N.H. 219, 400 A.2d 1169 (1979). In *King* the court reasoned that the state manifested an equally strong interest in maintaining a public official as it did in removing such a person, therefore by defending himself from removal, the official was protecting an important state interest, and the state was obligated to pay his counsel fees. *Id.* at 1171.

[¶ 36.] On a more general level, the United States Supreme Court has stated, "[A] Court first must determine if the applicant is a 'prevailing party' hy evaluating the degree of success ohtained." *Commissioner, INS v. Jean,* 496 U.S. 154, 160, 110 S.Ct. 2316, 2320, 110 L.Ed.2d 134, 143 (1990).

***273** [¶ 37.] Here, although Peterson was able to retain his position, he was not completely exonerated of all wrongdoing, and through the removal proceeding, County was successful in bringing about restitution and a change in his hehavior. Peterson admitted his failure to timely remit funds to the treasurer, as well as the improper accounting of the CBC payments. He agreed to remit fees on a timely basis in the future, and he agreed to properly account for the CBC payments. Further, Peterson was ordered to repay over

$1,200,[12] in addition to the $1,500 of personal funds he had already repaid.

[18] [19] [¶ 38.] Peterson's actions are not the type of conduct SDCL 3–17–10 rewards. Rather, the statute is intended to reimburse public officials who are innocent of wrongdoing in office. We think the term "favorable" in SDCL 3–17–10 must be strictly construed to mean "exculpation and not some lesser degree of success." *Kerwick v. City of Trenton,* 184 N.J.Super. 235, 445 A.2d 482, 484 (Law Div.1982). *See generally,* Kimberly J. Winbush, Annotation, *Payment of Attorneys' Services in Defending Action Brought Against Officials Individually as Within Power or Obligation of Public Body,* 47 A.L.R.5th 553 (1997).

[¶ 39.] The determination in this case was favorable to Peterson in the sense that he managed to retain his position. However, it was unfavorable to him because he was required to repay in excess of $2,700 in personal funds to the county, and he was admonished to change certain aspects of his office procedure. In view of the circumstances of this case, we hold that an equal apportionment of Peterson's expenses is reasonable and appropriate, since the determination was not totally favorable to either party. SDCL 3–17–10. Thus, the trial court abused its discretion in awarding full reimbursement of disbursements to Peterson. The case is remanded to the trial court with directions that it modify its order to award Peterson 50% of his disbursements.

[¶ 40.] 3. The trial court did not err in denying additional disbursements for attorney fees and expenses.

[20] [¶ 41.] The trial court denied Peterson's request for additional attorney fees and expenses, writing, "[w]ith regard to the request for additional attorney fees, I will not award attorney fees for obtaining attorney fees." By notice of review, Peterson argues that SDCL 3–17–10 mandates the payment of attorney fees and expenses, and the additional attorney fees and expenses were incurred only because County refused to acknowledge such directive. Therefore he asserts he is entitled to reimbursement for these expenses. In contrast, County simply asserts SDCL 3–17–10 does not allow the award of attorney fees for pursuing an award of attorney fees. We agree.

[¶ 42.] Actions for attorney fees incurred in obtaining attorney fees for an underlying action, so-called "fees-for-fees" litigation, have been decided along two lines. One line of reasoning holds fees-for-fees litigation as part of the underlying substantive issue that is being litigated. Under this rationale, statutes such as SDCL 3–17–10 were enacted to make a vindicated defendant whole, therefore all related fees are authorized as part of the underlying claim. *See, e.g., Commissioner, INS v. Jean,* 496 U.S. 154, 110 S.Ct. 2316, 110 L.Ed.2d 134 (1990); *274 *Am. Fed'n of Gov't Employees, AFL–CIO Local 3882 v. Fed. Labor Relations Auth.,* 994 F.2d 20 (D.C.Cir.1993); and *Salmon v. Davis County,* 916 P.2d 890 (Utah 1996). Following this line of reasoning, Peterson would be entitled to fees-for-fees, because such litigation was pursued as part of the larger effort to vindicate him and make him whole.

[¶ 43.] The other line of reasoning follows the traditional American rule that attorney fees cannot be recovered by a prevailing party absent express statutory or contractual authorization. This rationale characterizes fees-for-fees litigation as an issue separate and distinct from the underlying action. Because such fees would only benefit the individual litigant and are not sought in furtherance of the underlying claim or for the benefit of the public in general, they would be barred under statutes such as SDCL 3–17–10, which only provide for expenses incurred in defense of the substantive issue. *See, e.g., Barker v. Utah Pub. Serv. Comm'n,* 970 P.2d 702, 713 (Utah 1998), *Salmon,* 916 P.2d at 899–900 (Russon, J., dissenting); *Thornber v. City of Fort Walton Beach,* 622 So.2d 570 (Fla.Dist.Ct.App.1993); and *Van Horn v. City of Trenton,* 80 N.J. 528, 404 A.2d 615 (N.J.1979). Under this approach, Peterson's fees-for-fees would not be authorized by SDCL 3–17–10, because such litigation was not pursued in defense of the removal proceeding and because such an award is not specifically authorized by statute or contract.

[¶ 44.] Although both arguments are somewhat persuasive, we hereby adopt the latter line of reasoning and hold that Peterson is not entitled to fees-for-fees. He was not completely vindicated as a result of the removal proceeding, and SDCL 3–17–10 does not specifically provide for the payment of fees-for-fees.

[¶ 45.] We affirm in part, reverse and remand in part, and award no appellate attorney fees.

[¶ 46.] AMUNDSON and GILBERTSON, Justices, concur.

[¶ 47.] SABERS and KONENKAMP, Justices, concur in part and concur in result in part.

KONENKAMP, Justice (concurring in part and concurring in result in part).
[¶ 48.] I concur in the majority opinion on Issues 1 and 2, and on Issue 3, I join with Justice Sabers on points 1 and 2 of his special writing.

SABERS, Justice (concurring in part and concurring in result in part).
[¶ 49.] I concur in all respects except that I concur in result on Issue 3 for four reasons:

1. First, since we are affirming the trial court in denying additional disbursements (for attorney fees and expenses), it is not necessary to decide at this time whether or not they are permitted under the statute.

2. Second, since we decide to deny additional disbursements because the result was not entirely favorable to Peterson, any interpretation of the statute (SDCL 3–17–10) is not necessary to the holding, and therefore, simply *dicta*.

3. Third, it is a mistake to reach that unnecessary interpretation now for an even more important reason. It is wrong.

SDCL 3–17–10 is specific statutory authorization for an award of trial and appellate attorney fees. It provides in part: "If the *final* determination of such proceeding be favorable to such accused officer, he shall be allowed the reasonable and necessary expenses he has incurred in his defense, including a reasonable attorney fee, to be fixed by the court or judge[.]" (emphasis added). Obviously, the *final* determination is at the appellate level in the Supreme Court, not the trial court.

4. Fourth, it would be a mistake to have an incorrect, unnecessary interpretation on the books in this state because it ***275** would enable the County Commissioners to punish a county officer in circumstances like this, even though the initial determination, or trial court result, was entirely favorable to him. They could do this by forcing him to pay the cost and expenses of an appeal without personal costs to themselves. We should not provide them this one-sided advantage, especially when the Legislature intended otherwise.

[¶ 50.] KONENKAMP, Justice, joins this special writing on points 1 and 2.

All Citations

607 N.W.2d 262, 2000 S.D. 39

Footnotes

1 We note this case is titled, "State ex rel. Steffen v. Peterson." The Gregory County State's Attorney, Sandy Steffen, brings this suit on behalf of the Gregory County Board of Commissioners, so the Board should have been named as a party rather than Steffen. Steffen indicated the titling of the case was patterned after a previous removal proceeding, *State ex rel. Hooper v. Tarr*, 62 S.D. 305, 252 N.W. 854 (S.D.1934). However in *Hooper*, the state's attorney was in fact the party bringing the suit, not the Board or any other county entity.

2 The legislature changed this requirement in 1999. *See* footnote 6, *infra*.

3 This amount was originally alleged to be $285.60, but through cross-examination at trial, the amount was reduced to $198.60.

4 This amount was originally claimed to be $515.90, but was reduced to $406.90 through cross-examination at trial.

5 Prior to being amended in 1999, SDCL 7–9–1 provided in part:

> The register of deeds shall keep full and true records in proper books, of all deeds, mortgages, and other instruments authorized by law to be recorded in the register of deeds' office, and records of all chattel mortgages, bills of sale, conditional sale contracts, and other instruments authorized by law to be filed in the register of deeds' office, if the person offering any of such instruments pays in advance the fee required by law for recording or filing the same.

The 1999 amendment deleted the "in advance" phrase.

6 Prior to being amended in 1999, SDCL 7–9–17 provided in pertinent part:

> The register of deeds shall, within fifteen days after the expiration of each calendar month and also at the end of his term of office, file with the county auditor a statement under oath showing the fees ... which he has charged or received as such officer since the date of his last report or the beginning of his term of office and shall, also within

such fifteen days, deposit with the county treasurer the total amount of such fees which sum so deposited shall be placed to the credit of the general fund.

SDCL 7–9–17 was completely re-written in 1999 and now provides:

> Within the time frame established by the county commission, the register of deeds shall deposit with the county treasurer the total amount of fees and other collections received. Unless otherwise required, all fees and other collections shall be placed to the credit of the general fund. At the discretion of the register of deeds, fees and other transactions may be charged on account but shall be collected by the end of the following month. The register of deeds shall maintain a detailed record of any accounts receivable.

7 SDCL 7–9–18 states:

> Any register of deeds who shall neglect or omit to charge or collect the fees allowed by law for services rendered by him, or shall fail to keep a record of the same, or to make a correct statement thereof to the county auditor, or to pay over such fees to the county treasurer as provided in § 7–9–17, with intent to evade the provisions of said section, shall be guilty of theft.

8 In *Tarr,* removal proceedings were initiated against Tarr, a Gregory County Commissioner, by the Gregory County State's Attorney. The proceedings were dismissed a short time later by stipulation between the parties. However, an acting commissioner subsequently alleged that the stipulated dismissal was entered into with ulterior motives. According to the acting commissioner, Tarr and the State's Attorney were both in favor of building a new county courthouse, therefore the State's Attorney dismissed the action against Tarr so that he could be reinstated and vote for its construction. Upon learning of these allegations, the trial court entered an order reinstating the action against Tarr and replacing the State's Attorney with a Special State's Attorney. The court then conducted removal proceedings and found that, although Tarr was guilty of misconduct and nonfeasance, his actions were not so egregious as to warrant removal from office. The Special State's Attorney appealed the decision, and this Court held the trial court did not have any authority to summarily remove the State's Attorney from his office and appoint a Special State's Attorney. Thus, all acts of the Special State's Attorney were void and of no effect, and the Court dismissed the appeal.

9 Black's Law Dictionary, defines malfeasance as: "A wrongful or unlawful act; esp., wrongdoing or misconduct by a public official." Black's Law Dictionary, 968 (7thEd. 1999).

10 Black's Law Dictionary defines nonfeasance as: "The failure to act when a duty to act existed." Black's Law Dictionary, 1076 (7thEd. 1999).

11 SDCL 7–9–15 states:

> The register of deeds shall charge and receive the following fees:
>
> (1) For recording deeds, mortgages, and all other instruments not specifically provided for in this section or this code, the sum of ten dollars for the first page and two dollars for each additional page or fraction thereof. Each rider or addendum shall be considered as an additional page;
>
> (2) For a certified copy of any instrument of record, including certificate and official seal, two dollars plus twenty cents for each page after five pages, and for an uncertified copy, one dollar, plus twenty cents for each page after five pages. The board of county commissioners by resolution shall establish the fees charged for duplicate microfilm. In addition to the fee for a certified copy of the record of any birth, there is an additional charge of two dollars for each copy requested, which shall be submitted on a monthly basis to the state treasurer to be deposited in the children's trust fund;
>
> (3) For filing and indexing a bill of sale, seed grain lien, or thresher's lien, the sum of ten dollars. No fee may be charged for filing any satisfaction or termination of any instrument as prescribed in this subdivision;
>
> (4) For recording oil, gas, and mineral leases, and other recorded documents relating to mineral or oil and gas lease exploration and development, six dollars per page; and
>
> (5) Notwithstanding the provisions of subdivision (2) of this section, the board of county commissioners shall fix by resolution the fees to be paid by licensed abstracters of the county or by any person who has passed the written examination established by the Abstracters' Board of Examiners pursuant to § 36–13–11 for uncertified copies of recorded instruments, which fee may not exceed the actual cost to the county for providing such copies.
>
> The register of deeds may not charge a fee for discharging or canceling any personal property lien.

12 It is noteworthy, however, that the trial court did not specifically order Peterson to repay this money as a condition of retaining his position. It stated in its letter opinion awarding disbursements:

> Steffen points out that several allegations in the pleadings were proven to be true. For example, Peterson was late with his payments and he had to remit $1060 for CBC fees and $198.60 that he was short on his fees. This is not an indication that the state won. Peterson would be obligated to pay these sums whether the court ordered it or not.

End of Document